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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BESSIE WAGNER, Petitioner

v.

CHARLES N. FAIRLAMB, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	5
Reasons for granting the writ	15
Conclusion	16
Appendix A—Opinions and judgment below	

Citations

Cases:

Ancient Egyptian Arabic Order N.M.S. v. *Michaux*, 279 U.S. 737, 73 L. ed. 931, 49 S. Ct. 485 (1928) 13

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U.S. 673, 74 L. ed. 1107, 50 S. Ct. 451 (1931) 10

Cole v. *Kyle*, 141 Colo. 492, 348 P. 2d 960 (1960) 5, 9

Davis v. *Wechsler*, 263 U.S. 22, 68 L. ed. 140, 44 S. Ct. 13 (1923) 12, 13

Frey & Sons v. *Cudahy Packing Co.*, 256 U.S. 208, 65 L. ed. 892, 41 S. Ct. 451 (1920) 5

Great Northern R. Co. v. *Sunburst Oil and Ref. Co.*, 287 U.S. 358, 77 L. ed. 360, 53 S. Ct. 145 (1932) 10

PAGE

L. McBrine Co. v. *Silverman*, 121 F. 2d 181 (9th Cir. 1941) 5

Napue v. *Illinois*, 360 U.S. 264, 3 L. ed. 2d 1217, 79 S. Ct. 1173 (1959) 13

Radio Station WOW, Inc. v. *Johnson*, 326 U. S. 120, 89 L. ed. 2092, 65 S. Ct. 1475 (1944) 10

Saunders v. *Shaw*, 244 U. S. 317, 61 L. ed. 1163, 37 S. Ct. 638 (1916) 5, 8, 9, 10

Scott v. *Bohe*, 81 Colo. 454, 256 Pac. 315 (1927) 5, 9

Tot v. *United States* — *United States* v. *Delia*, 319 U. S. 463, 87 L. ed. 1519, 63 S. Ct. 1241 (1943) 10, 15

United States v. *Carolene Products*, 304 U. S. 144, 82 L. ed. 1234, 58 S. Ct. 778 (1937) 5

Statutes:

U. S. C. Constitution, 14th Amendment 4

28 *U.S.C.*, § 1257(3) 2

Miscellaneous:

1 *Thompson, Real Property*, §§ 390 et seq. (perm. ed. 1939) 6

2 *Tiffany, Real Property*, § 363(c) (1920) 10, 11

IN THE

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OCTOBER TERM, 1962

No. _____

BESSIE WAGNER, Petitioner

v.

CHARLES N. FAIRLAMB, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner prays that a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado, entered in the above-entitled case on February 18, 1963. In addition to Charles N. Fairlamb, other respondents to this petition for writ of certiorari are Gertrude Mahoney, Sanna Litjestrom, Viola Raso, James Eyfe and Mildred Fennas.

CITATIONS TO OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Order of the District Court in and for the County of San Miguel and State of Colorado (R. 40-41) is unreported. It is printed in Appendix A hereto, *infra*, pp. 16-20, together with the Judgment and Decree of said District Court which is also unreported. The opinion of the Supreme Court of the State of Colorado is not yet officially reported but it is anof-

ficially reported in 379 P.2d 165 (1963), and is printed in Appendix A hereto, *infra*, p. 21.

JURISDICTION

The opinion of the Supreme Court of the State of Colorado issued on February 18, 1963, affirming the Judgment and Decree of the District Court. Petition for rehearing was timely filed by petitioner, and rehearing was denied on March 11, 1963. On May 31, 1963, Mr. Justice White extended the time for filing petition for writ of certiorari to and including August 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) because a title, right, privilege or immunity was claimed under the Constitution of the United States, which claim was rejected by the Supreme Court of the State of Colorado.

QUESTIONS PRESENTED

Whether the Supreme Court of the State of Colorado denied petitioner a hearing by deciding the controversy on grounds not within the issues framed by the trial of the case.

Whether the Supreme Court of the State of Colorado arbitrarily noticed and applied an inference having no rational basis, thereby depriving petitioner of procedural due process of law.

Whether the Supreme Court of the State of Colorado, by arbitrarily imposing an easement on petitioner's private property, deprived petitioner of substantive due process of law.

STATEMENT

Petitioner and respondents are owners of adjoining mining properties. Both petitioner's and respondents' parcels of land were once held by a common owner (R. 77). In the

year 1919 the unitary title was severed, the common owner conveying petitioner's property to her predecessor in interest (R. 87).

Respondents first asserted a claim to an easement across petitioner's property when, in 1955, they caused a road to be bulldozed over a waste dump and a settling pond located on petitioner's property and used in connection with her mining operations (R. 103, 123). When petitioner discovered that this road had been opened, she barricaded and obstructed it (R. 90). Respondents brought an action to recover damages for petitioner's alleged trespass to the claimed easement and for injunction against any future trespasses. The material theory of the complaint was that an easement was impliedly reserved by the common owner because of an apparent and pre-existing use of the way by the common owner (R. 8-10).

The trial was conducted according to the theory that an easement was implied by apparent and pre-existing use. The evidence adduced showed that a trail existed several year prior to the 1919 conveyance, and that the trail led to respondents' property, crossing petitioner's property. There was evidence that such trail existed many years after the conveyance. But there was no evidence of a visible trail at the time of the conveyance.

On the issue of necessity sufficient to support an easement implied by pre-existing use, there was evidence that the terrain in question was rough and precipitous (Exhibit A R. 69), that construction of a road other than the one in question over another route would be expensive (R. 210), but that in 1919, at the time of the conveyance, there was little use for roads other than pack trails, since mechanized vehicles were not used locally in mining operations (R. 67, 268). At the only time respondents' property was actively mined, i.e., 1911 and 1912, there was a tramway which pro-

vided the primary means of access (R. 152). In addition to the tramway, there were trails following routes other than the one in dispute. Pack animals traveled over these trails, and these trails were utilized as an important means of access to respondents' property (R. 61, 235, 248, 267, 292).

How Federal Question Presented

The trial court gave judgment for respondents, finding, aided by an advisory jury, all the elements required for an easement implied by pre-existing use. Respondents' proffered instruction which dealt with the theory of easements implied by necessity alone was rejected. Petitioner made timely petition to the Supreme Court of the State of Colorado for writ of error. After submission of briefs, and after hearing oral arguments, the Supreme Court of the State of Colorado affirmed, holding that though the trial court had erred in finding an easement implied by pre-existing use, the result should be sustained because the evidence would support an easement implied by necessity. Petitioner asserted in her motion for rehearing that the court had substituted itself for the trior of fact, thus calling attention of the state tribunal to the fact that it had denied petitioner a hearing on the question whether the facts would support such necessity existing in 1919 as would, alone infer the reservation of an easement, depriving petitioner of her right to procedural due process under U.S.C. Constitution, 14th Amendment. Petitioner asserted in her motion for rehearing that there was no evidence upon which to base an implication of an easement supported by necessity alone, thus giving the state tribunal notice that it had taken petitioner's property for public use without compensation, depriving petitioner of her right to substantive due process under U.S.C. Constitution, 14th Amendment.

Notwithstanding the allegations of petitioner's motion

for rehearing, the Supreme Court of the State of Colorado denied a rehearing, its judgment thus becoming final.

REASONS FOR GRANTING THE WRIT

I. There is a subsisting rule of judicial administration which says that the result reached in a lower court ought not be disturbed if it can be sustained on any grounds. *Fried & Sons v. Cudahy Packing Co.*, 256 U.S. 208, 65 L.ed. 892, 41 S.Ct. 451 (1920). See *L. McBrine Co. v. Silverman*, 121 F.2d 181 (9th Cir. 1941). This principle of administration has been asserted in the Colorado cases, *Cole v. Kale*, 141 Colo. 492, 348 P.2d 960 (1960), and *Scott v. Bohr*, 81 Colo. 454, 256 Pac. 315 (1927). This controversy involves a collision between the rule and the generally appreciated constitutional principle that a party to litigation must be afforded an opportunity to be heard and to introduce evidence in support of his contentions. *Saunders v. Shaw*, 244 U.S. 317, 61 L.ed. 1163, 37 S.Ct. 638 (1916); *United States v. Carolene Products*, 304 U.S. 144, 82 L.ed. 1234, 58 S.Ct. 778 (1937).

This case involves a dispute over a claimed easement. The parties are owners of mining property derived from a remote common grantor in 1919. In 1955 respondents first asserted their claim to an easement by constructing a road across petitioner's property in her absence. The trial of the action was based on the theory that there was a pre-existing use putting petitioner's predecessor on notice that an easement was intended to be reserved. The trial court found all of the elements required for an easement implied by pre-existing use, including, *inter alia*, use so long continued as to impart notice to the grantee and reasonable necessity for the easement.

Upon writ of error proceedings in the Supreme Court of the State of Colorado, petitioner urged that there was no

evidence supporting the finding that there was a use so long continued as to impart notice to the grantee. She also urged that there was a failure to carry the burden of proof to show reasonable necessity at the time of the conveyance for the claimed easement. The state tribunal agreed with petitioner's first contention, holding at p. 24, *infra*, Appendix B,

> "In any event an examination of this record reveals that the evidence does not support the trial court's finding of an implied easement by way *of a pre-existing use* since at best a terminated intermittent rather than a permanent use was shown. However, if the record discloses that the court arrived at the correct result for the wrong reason we will not set aside its judgment. Scott v. Bohe, 81 Colo. 454, 256 Pac. 315 (1927). Thus, we need to consider further the facts and the law applicable to this case".

The court then undertook to examine the record to ascertain whether the easement claimed by respondents could be sustained on the theory of implication by necessity alone. It is vitally important to petitioner's case to notice at this point that the Colorado court distinguished between the theory supporting intent implied by pre-existing use and the theory supporting intent implied by necessity alone. The court cited and relied on 1 *Thompson, Real Property* § 390 et seq. (perm. ed. 1939) throughout, recognizing that divergent facts give rise to differing conclusions. A reading of the authority prominently considered by the court shows that a degree of necessity for the easement is required to raise the inference of intent to create an easement where there has been long continued and apparent use of a way before severance of the title. The authority also shows that there must be a greater and different degree of necessity if the inference of an intent to create an easement rests on

necessity alone. The opinion of the court below shows that it appreciated this distinction and intended to preserve the distinguishing features of the two theories.

Notwithstanding its recognition of the legal principle that the degree of necessity required for establishment of an easement of necessity substantially surpasses the degree of necessity required for establishment of an easement implied by pre-existing use, the court analyzed the record as if the differing degrees of necessity were coincident. It found in the record facts which it held were sufficient to support the inference of an intent to create an easement, holding that the facts showed a degree of necessity which, standing alone, would support such an inferred intent.

Petitioner conducted her case before the trial court with the belief that she need only rebut respondents' evidence of the lesser degree of necessity associated with easements implied by pre-existing use. The Colorado court found that this was the theory upon which the trial was conducted, and it dealt at length with this theory in its opinion. That the theory of an easement implied by necessity alone was not included within the issues made in the trial court is shown by the fact that the trial judge rejected a jury instruction tendered by respondents which was based on that theory (R. 18). Had petitioner known that the case would be adjudicated on the basis of an easement implied by necessity alone, she would have introduced evidence addressed to the question whether there was such necessity. In the actual event she limited her proofs to a showing that the lesser degree of necessity required to support an easement implied by pre-existing use did not exist. She was thus deprived of a hearing on the issue of a degree of necessity which is alone sufficient to support an intent to create an easement.

Upon these facts, the decision of the Supreme Court of

Colorado conflicts in principle with *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.ed. 1163, 37 S.Ct. 628 (1916). In that case respondent had brought an action in a state court to enjoin collection of a special improvement tax. Petitioner intervened as a bondholder of the district. Respondent offered to show at trial that his land would not be benefitted by improvements projected by the district. Petitioner objected to respondent's offer of proof and the objection was sustained. The rejected evidence was spread upon the record to preserve respondent's exception to the ruling of the trial court. Petitioner offered no contrary evidence. The injunction was denied by the trial court, but the trial court was reversed on appeal to the highest court of the state. The state tribunal held that respondent's evidence established lack of benefit to his land, invalidating the tax as applied to the particular facts. Petitioner argued on motion for rehearing that he had been deprived of procedural due process by the action of the appellate court. Rehearing was denied. Reversed upon writ of error to the state supreme court. The Court held that petitioner was justified in relying upon the ruling of the trial court which framed the issues in controversy, and that, in consequence of the state tribunal deciding the case on facts not litigated in the trial court, petitioner had been denied a hearing on a material issue in the case.

In the present case, petitioner relied upon the theory upon which the case was tried by the trial court. She did not have notice that the case would be settled on facts not litigated, i.e., facts suggesting necessity which would, standing alone, support an implied intent to create an easement. That neither party could predict that the Colorado court would go afield from the theory of the case as developed upon trial is shown by respondents' answer brief (R. Answer Brief, p. 23) where respondents ask for a new trial on the theory of an easement implied by necessity alone.

The question presented is a matter of general concern since it involves a limitation on the important principle of judicial administration that, where possible, the results reached by a trial court should be sustained on appeal. The case presents a somewhat different aspect of the limitation imposed by the requirement for procedural due process upon the rule, since it involves petitioner's reliance upon the theory of the case, rather than upon rulings of the trial court as in *Saunders* v. *Shaw*, *supra*. It must frequently occur that litigants rely upon the issues made by proof in a case, not supposing that the case will ever be decided upon any other theory. The great departure of the Colorado Supreme Court from previous applications of the rule in question is demonstrated by comparing the present case with the earlier cases of *Cole* v. *Kyle*, 141 Colo. 492, 348 P.2d 960 (1960), and *Scott* v. *Bebo*, 81 Colo. 454, 256 Pac. 335 (1927). Aside from the fact that the instant case has important implications for other appellate courts reviewing the decisions of lower courts, it conflicts with the principle of decision announced by this Court in *Saunders* v. *Shaw*, *supra*, for no reasons appear why a litigant is not as justified in relying upon the theory by which litigation is conducted as in relying upon the rulings of a trial court.

Petitioner is cognizant of the usual rule that claims of federal right first asserted on motion for rehearing come too late for consideration. But the facts of this case bring it within the exception to the usual rule announced by Mr. Justice Holmes in *Saunders* v. *Shaw*, *supra*:

> "But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." (244 U.S. at p. 320)."

In accord with *Saunders v. Shaw*, see *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475 (1944); *Great Northern R. Co. v. Sunburst Oil and Ref. Co.*, 287 U.S. 358, 77 L.ed. 360, 53 S.Ct. 145 (1932); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L.ed. 1107, 50 S.Ct. 451 (1931).

II. Petitioner conceeds it is well established that an easement may be created by implication, and that a court can find such an easement without offending requirements for substantive due process. The reason why substantive due process isn't involved in the usual case is the reality that implication of an easement rests upon the inferred intent of the parties to the transaction by which the dominant and servient tenements are severed by the common owner.

Petitioner contends that imposition of the claimed easement in the present case constitutes a taking of her private property for public use without compensation because there was no rational basis for the inference of an intent to create an easement. Both of the parties to the conveyance by which the Colorado Supreme Court found an easement was created are dead. There was no direct evidence of the intent of the parties. The court presumed intent from the circumstances. If the circumstances will not support the inference, then the presumption must fail. *Tot v. United States — United States v. Delia*, 319 U.S. 463, 87 L.ed. 1519, 63 S.Ct. 1241 (1943).

The rationale of the presumption of an intent to create an easement when a measure of necessity for the particular easement is shown is stated by 2 *Tiffany, Real Property* § 363 (c) (1920):

> "Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's, land, or which is accessible only across either

the grantor's land or the land of a stranger. In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but limited use, if any, of the land conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction that, in the absence of indications of a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land. (p. 1297)".

Since the presumption of an intent to create an easement rests with the presumed intent of the parties at the time of the conveyance, the necessity which, standing alone, gives rise to the presumption must be necessity existing at the time of the conveyance. Says 2 *Tiffany, Real Property, supra,*

> "Since a way of necessity exists by reason of a construction of the conveyance, based on the necessity of such way to the user of the land conveyed or retained, it is the necessity which exists at the time of the conveyance which determines the existence of the way, and not a necessity which may subsequently arise by reason of a change of circumstances. (p. 1363)".

The evidence introduced by respondents upon trial of the cause failed to show any indication of necessity for the claimed roadway at the time of the conveyance from the common owner in 1919. The undisputed and unimpeached testimony of petitioner's and respondents' witnesses showed that roads were not utilized at that time for access to mines in the same community. The primary means of access to

respondents' property was a tramway which operated when mining was conducted on respondents' property. Packtrains provided an auxiliary means of transportation, and these packtrains arrived at respondent's property by trails other than the one claimed to have once followed the route of the claimed easement.

Aside from the fact that there was no necessity for the claimed easement in 1919, there is the independent fact that an easement can't be rationally inferred along the route claimed by respondents. The property conveyed to petitioner's predecessor in interest was mining property with a mill situated upon it. It does violence to reason to suppose that an easement was intended across a mine dump upon which debris would be constantly deposited. Settling sediments is an indispensable part of milling operations. It is irrational to suppose that an easement was intended across a settling pond which would be constantly inundated by water and sludge.

The Colorado court asserted the implication of intent to create an easement as the adequate ground upon which to justify action which would otherwise be an unlawful taking of petitioner's property for public use. This court has jurisdiction to inquire whether the otherwise adequate state ground is supported by evidence.

In the case, *Davis* v. *Wechsler*, 263 U.S. 22, 68 L.ed. 140, 44 S.Ct. 13 (1923), the Court considered an action for personal injuries sustained on a railroad while it was under federal control during World War I. The action was brought in a state court against the Director General. The case involved a dispute concerning jurisdiction of the trial court. The state court found that appearance by the defendant constituted a waiver of objections to venue of the forum. Affirmed on appeal. The Court granted certiorari, holding that it had jurisdiction to go behind facts found by

the state court where a claim of federal right was affected by the finding.

Approval of *Davis* v. *Wechsler* is found in *Ancient Egyptian Arabic Order N.M.S.* v. *Michaux*, 279 U.S. 737, 73 L.ed. 931, 49 S.Ct. 485 (1928). Suit was brought by a masonic fraternity for an injunction to restrain a similar fraternity from utilizing regalia, insignia or names imitative of the plaintiff. Defendant had been incorporated in the District of Columbia. The action was initiated in a state court. Defendant argued that it exercised a right under its articles of incorporation issued by Congress, and argued that plaintiff was estopped by laches to assert better right to use the identifying features in question. The trial court found that there had been no laches, issuing the sought after injunction. Affirmed by the state appellate court. After granting certiorari to hear the case, the Court held that a federal right was affected by the findings of fact as to laches, holding that it could inquire whether a federal right was denied in substance by interposing a nonfederal ground of decision having no fair support.

> "The right . . . is a federal right. Whether it was denied or not given due recognition by the challenged decree as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support. (279 U.S. at 744)".

That these cases have lost nothing in vitality is shown by *Napue* v. *Illinois*, 360 U.S. 264, 3 L.ed.2d 1217, 79 S.Ct. 1173 (1959). The latter case involved a state criminal prosecution in which a state's witness testified falsely that he had received no promise of consideration from the state or

its agents for testimony implicating petitioner in the commission of a crime. In fact, he had been promised consideration by the prosecuting attorney. The witness testified that he had received a promise that an unidentified public defender "would do what he could" for him. Petitioner submitted a petition to the state supreme court to set aside the conviction, and the petition was dismissed. The state court found as a matter of fact that petitioner was not prejudiced by the false testimony because of the witness' admission that a public defender had promised him assistance. The judgment was reversed on writ of certiorari. The Court rejected the state's argument that the state court's finding of fact precluded the Court from making an independent investigation of the record. The Court said:

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter, (U.S.) 1 Wheat. 304, 4 L.ed. 97; Cooper v. Aaron, 358 U.S. 1, 3 L.ed.2d 5, 78 S.Ct. 1401. This principle was well stated in Niemotko v. Maryland, 340 U.S. 268, 271, 95 L.ed. 267, 270, 71 S.Ct. 325, 328: 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.' (360 U.S. at 271)".

Petitioner claims that the action of the state courts of Colorado deprives her of her private property without compensation. If the finding of an intent to create the easement claimed by respondents is not supported by substantial evidence, her contention is true. No other support for the easement is suggested by the record except the presumed intention of the parties to the transaction by which

petitioner's predecessor acquired his interest in the mining property which the Colorado Supreme Court found to be impressed with the burden of an easement.

This case presents a matter of general concern, since it appears that the Court has never entertained the question whether an implied easement must be supported by substantial evidence affording a rational basis for inferred intent. Petitioner believes that if there need be no rational basis for the presumption that parties to a conveyance intended to create an easement, as inferred by the opinion of the Supreme Court of Colorado, then the state may take private property for public use without compensation, through the expedient of arbitrarily finding the formal prerequisite of an intent to create such a way for the use of others.

The decision of the Colorado Supreme Court appears to conflict with the principle of decision in *Tot* v. *United States* — *United States* v. *Delia*, *supra*, wherein it is held that an inference of fact must be supported by a rational basis, and wherein it is held that notice of an inference having no rational basis has the effect of denying the party adversely affected procedural due process. Upon the facts of petitioner's case there is an utter lack of rationality in the inference that petitioner's predecessor in interest and the common grantor intended the reservation of the easement now claimed by respondents.

CONCLUSION

For the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Denver 2, Colorado

APPENDIX A

IN THE DISTRICT COURT
WITHIN AND FOR THE COUNTY OF
SAN MIGUEL AND STATE OF COLORADO

Civil Action No. 2093

CHARLES N. FAIRLAMB, et al; Plaintiffs

vs.

BESSIE WAGNER, Defendant.
E. F. KRAUS, et al, Third Party Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

This matter was tried commencing August 30, 1961 with jury of twelve, which was advisory to the court as to questions of title. Special verdicts in the form of nine questions were submitted to the jury and answered.

Defendant has filed Motion for New Trial and Motion for Directed Verdict and for Judgment Non Obstante Veredicto. These motions were argued on September 18, 1961. The two motions are based upon the same points which will be considered below in the order pleaded in the motions.

1. The contention that plaintiffs obtained four extra peremptory challenges by a sham claim against Third Party, E. F. Kraus, does not appear founded on fact, even though Kraus did not have his own counsel, and in any event, no prejudice is shown to have resulted to defendant.

2. It does not appear to the court that the Special Verdicts show that the jury misunderstood the instructions except as to the period of commencement of possible adverse possession. No objection was made to the instructions by defendant, and in view of the conclusion of the court on this issue, no prejudice can result.

3. The court concludes that there was sufficient evidence to support the findings of the jury of an easement by implication and that the width thereof did not exceed six feet, and the court adopts Special Verdicts Nos. 1, 2 and 3.

4. The doctrine of laches could not apply because the evidence as to the conditions in the mining industry indicates no reason to use the easement until recently and no previous knowledge that defendant or her predecessor did not recognize the existence of an easement.

5. The contention that the jury, regardless of the instructions, proceeded on the theory that this is a public road is without foundation.

6. After considering the evidence and authorities on the question of adverse possession, the court concludes that there was insufficient evidence of adverse possession to allow this issue to go to the jury and the court therefore sets aside Special Verdicts Nos. 4, 5 and 6 and finds that adverse possession was not established by a preponderance of the evidence.

7. The evidence, including the inspection of the property by court and jury, will sustain a verdict of no actual damage to defendant by the widening of the road and the jury were not instructed to find nominal damages.

8. Except as above noted, the findings of the jury are supported by the evidence and adopted by the court.

9. The motions of defendant are overruled.

It is further ordered:

1. That plaintiffs submit to the court form of decree in conformity with the foregoing.

2. That any further motions by defendant would be unavailing and are dispensed with.

Done this 28th day of September, 1961.

BY THE COURT:

s/ GEORGE V. KEMPF, Judge.

IN THE DISTRICT COURT
WITHIN AND FOR THE COUNTY OF
SAN MIGUEL AND STATE OF COLORADO

Civil Action No. 2095

CHARLES N. FAIRLAMB, et al, Plaintiffs,

vs.

BESSIE WAGNER, Defendant.

E. F. KRAUS, et al, Third Party Defendants.

JUDGMENT AND DECREE

This matter having come to be heard by the Court and an advisory jury of twelve as to questions of title and having come on to be tried to the said jury of twelve as to questions of damages, commencing August 30, 1961, the Court, having heard evidence offered by the parties, having heard oral arguments by counsel, having been advised as to questions of title by the said jury by its special verdicts, a verdict in favor of plaintiffs for damages against defendant having been entered by the said jury, and the Court having made Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the plaintiffs do have and recover of the defendant the sum of $150.00 with interest at the rate of six per cent per annum from the date hereof.

2. That plaintiffs, their heirs, executors, administrators, successors and assigns, as owners of the following described

real property situate in the County of San Miguel, State of Colorado (hereinafter referred to as the "dominant estate"), to wit: The S½ of the Bradley Lode Mining Claim, U. S. Survey No. 190, are the owners of a permanent and perpetual easement and right of way over and across the following described real property situate in the County of San Miguel, State of Colorado (hereinafter referred to as the "servient estate"), to wit:

The N½ of the Bradley Lode Mining Claim, U. S. Survey No. 190, and the Red Jacket Lode Mining Claim, U. S. Survey No. 1634. Said easement and right of way is appurtenant to the dominant estate and burdens the servient estate and is and shall be for the purpose of ingress to and egress from the dominant estate for the benefit of the present owners, or future owners, of the dominant estate. Said easement and right of way is and shall be in that location over the servient estate in which a roadway now exists and is located, provided however, that the width of said easement and right of way shall be limited to six feet, three feet on each side of the center line of said easement and right of way, the said center line being described as follows:

Those segments which cross over and upon the servient estate of a line beginning at a point whence the portal of the S½ of the Bradley Lode Mining Claim bears S 10° 32' E, 74 feet, said portal being N 18° 07' W, 544 feet from Corner No. 3, being the SW corner, of the said Bradley Lode Mining Claim, Survey No. 190; thence S 53° 40' W, 76 feet; thence S 15° 09' W, 36 feet; thence S 77° 13' W, 250 feet; thence N 38° 59' E, 75 feet; thence N 55° 34' E, 78 feet; thence N 38° 20' E, 38 feet; thence N 14° 44' E, 43 feet; thence N 9° 16' W, 55 feet; thence N 32° 27' W, 26 feet; thence N 48° 53' W, 78 feet; thence N 38° 45' W, 22 feet; thence S 85° 48' W, 77 feet; thence N 70° 18' W, 36 feet; thence

N 87° 16' W, 233 feet, more or less, to the center of the terminus of a public highway commonly known as the Cimmaron Road, said terminus being situate on the said Red Jacket Lode Mining Claim Survey No. 190;

3. Defendant and her hgirs, executors, administrators, successors and assigns are hereby perpetually enjoined from any manner obstructing or interferring with the use of said roadway and easement above described appurtenant to and for the benefit of the property of plaintiffs above described.

4. That plaintiffs recover their costs herein. Done in Open Court this ..... day of November, 1961.

.....

District Judge

NO. 20198

BESSIE WAGNER, Plaintiff in Error,

vs.

CHARLES N. FAIRLAMB, GERTRUDE MAHONEY, SANNA LILJESTROM, VIOLA RASO, JAMES R. FYFE, and MILDRED FENNAS, Defendants in Error.

Error to the District Court of San Miguel County

HON. GEORGE V. KEMPF, *Judge*

EN BANC JUDGMENT AFFIRMED

MESSRS. LOESCH AND KREIDLER,
Attorneys for Plaintiff in Error.

MESSRS. TRAYLOR, ELA, KLADDER & HERSHMAN,
MR. DAVID B. PALO
Attorney for Defendants in Error.

MR. JUSTICE SUTTON delivered the opinion of the Court.

Defendants in error, who were plaintiffs in the trial court will be referred to as plaintiffs in this opinion. They alleged that they have a right-of-way for a recently constructed road to the south half of the Bradley claim across mining property owned by defendant. The issues were made by an amended complaint and the answer thereto. Trial was had to the court with an advisory jury, with the result that plaintiffs obtained judgment for the right-of-way claimed plus damages of $130.00. The judgment entered was based upon the existence of an implied easement, stemming from a common grantor, one A. E. Reynolds, who in 1919 had conveyed the north half of the Bradley claim to the defendant's predecessor in title.

Plaintiffs' pleadings alleged several reasons why they were entitled to the claimed easement or right-of-way. The trial court narrowed the issues to those of whether a right-of-way had arisen by (1) implication or (2) by prescriptive use. The advisory jury found in the affirmative on both issues, but in its findings of fact the court concluded there was insufficient evidence to support the special verdict on adverse possession. It adopted, however, the jury's verdict as to a right-of-way by "implication" (meaning thereby one by pre-existing use).

The properties involved besides the south half of the Bradley claim, owned by plaintiffs, and the north half of the Bradley owned by defendant, are the Red Jacket claim, owned by defendant, and the Pioneer Mill site, owned by Idarado Mining Company.

The plaintiffs' recently constructed road is on or crosses all these properties allegedly following an old route first running easterly on the north slope, thence southwesterly across a stream, then northeasterly to its terminus on the south slope. Plaintiffs only dispute is with defendant, the owner of the Pioneer Mill Site not being a party to this action. The claims themselves run generally northwest-southeast across a narrow canyon and are bisected near their middle by the aforementioned small stream that flows in a westerly direction. The Red Jacket claim lies along the westerly side of the Bradley except for a pointed sliver of the Pioneer Mill Site separating the two claims from south to north for about three-fourths of their length. The south half of the Bradley is on the south bank of the stream.

The evidence is that prior to 1919 Reynolds owned the entire Bradley claim; that at the time there was a public road which entered the west end of the Cimarron mill site and stopped about the middle of the site, and that this road continued on easterly as a private road across the mill site

and the north half of the Bradley; further, that a mule pack or wagon trail at one time had served the south half of the Bradley and joined this road. Parts of this latter trail had long since become invisible through disuse and by the growth of bushes and other foliage. It also appears that the plaintiffs had bulldozed their truck road generally along the route of the old mule trail and in so doing had excavated across part of the defendant's dump. Shortly after defendant discovered plaintiffs' road she barricaded it and this lawsuit followed.

The record is voluminous and contains numerous exhibits including several photographs and maps as well as some conflicting testimony and some stipulated facts. The several assigned grounds for reversal lead us to conclude that the entire dispute can be resolved by answering the following questions:

1. Does the evidence prove all the elements necessary to establish either an implied easement by way of a pre-existing use or a way of necessity?

2. The trial court having decreed that the defense of laches for failure to assert an alleged way of necessity for many years was not applicable because of generally poor economic conditions in the mining industry in the area in question, of which the court took judicial notice, did it thereby commit error?

The law has long recognized the interest in land known as an "easement" and that it can take several forms. One is the actual or express easement that appears in a deed or contract for the sale of land. This form is easy to recognize and usually not difficult to apply if fully described. A second type is the implied easement, which creates problems for both litigants and the courts. It is one not expressed by the parties in writing, but which arises out of the existence of certain facts implied from the transaction.

Generally implied easements have not been looked upon with favor by the courts. Under some circumstances and facts, however, they are recognized. See 4 *Thompson, Real Property*, §§ 390 and 394 (perm. ed. 1939).

Implied easements have been subdivided into those which are implied due to a grant and those implied from a reservation. The former moves in favor of the grantee and the latter in favor of the grantor. Some courts have treated such easements differently. See 3 *Tiffany, Real Property*, § 791 (3rd ed.).

In 4 *Thompson* supra, § 396, at page 647, the necessary elements to prove an implied easement are set forth as:

> "(1) Unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servient tenement existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement."

It seems well to point out here that *Thompson's* four detailed requirements apply essentially to an implied easement by pre-existing use, for his third ground is not necessary for the existence of an implied easement by way of necessity as will more fully hereinafter appear. In any event an examination of this record reveals that the evidence does not support the trial court's finding of an implied easement by way *of a pre-existing use* since at best a terminated intermittent rather than a permanent use was shown. However, if the record discloses that that court arrived at the correct result for the wrong reason we will not set aside its judgment. *Scott v. Bohe*, 81 Colo. 454, 256 Pac. 315 (1927). Thus, we need to consider further the facts and the law applicable to this case.

Part of the evidence here is that the south half of the Bradley was mined prior to 1919, but there is little evidence as to how this operation was carried on. In addition, there was evidence to show the presence of a mining dump and a tailing's pond in one part of the area where the new road has been constructed, which would tend to negate the existence of any former road in these locations unless it existed before they were created. At least one of the early photographic exhibits indicates such a route however. The obvious conclusion is that if a road had once been there its use had been abandoned possibly even before the severance; thus defendant might not have been placed on notice at the time of severance that an easement existed. Though the remaining three enumerated elements for an implied easement due to a pre-existing use appear to be present here to some degree, nevertheless unless all four can be identified, such an easement is not created in law.

We must next consider whether this record discloses the applicability of the doctrine of implied easement *by way of necessity*. This rule has recently been recognized in Colorado in *Fred Martino* v. *Charles G. Flesner*, 148 Colo. 136; 363 P. 2d 247 (1961), and is controlling in this case if the facts warrant its application as we conclude they do.

An implied way of necessity arises when the owner of a parcel of land conveys and grants part thereof to another, which leaves the remainder of the land without ingress or egress, except over the part conveyed. In such case reservation of a way of necessity is implied. The most common application of the doctrine occurs, however, when it is implied with the grant, e.g., where the lands conveyed are without ingress or egress except over lands retained. In such a case the lands retained are held to be subject to an easement in favor of the grantee. See 17 a *Am. Jur. Easements*, § 58.

It appears from the foregoing authorities that generally there are three requirements to be met before a way of necessity can be said to exist: The first requires that the original ownership of the entire tract be held by a single grantor prior to a division thereof. As previously noted, all of the Bradley claim originally was owned by A. E. Reynolds who conveyed away the north one-half thereof. The second requires that the necessity existed at the time of the severance. The evidence here indicates that in 1919, as at the present time, the south half of the Bradley was virtually inaccessible except by the route now in dispute. The third requirement is that the necessity for the particular right-of-way be great. Here the testimony of several residents of the Telluride area, as well as that of an expert witness (all borne out by the photographs in evidence), was to the effect that this is a very mountainous, rocky area with steep canyon walls, where roads at best are hazardous, expensive and dangerous to build. Documents in evidence support plaintiffs' contention that plaintiffs' road as now constructed is under all the circumstances the only practical method of affording ingress and egress for the purpose of mining or otherwise using the south half of the Bradley. And, based upon conflicting evidence and its view of the area during the course of the trial, the trial court found that this road was necessary and that the necessity existed in 1919 as well as today. In this connection we take cognizance of the fact that some authorities have held that a way of necessity cannot exist merely because the land is too steep or too narrow for a reasonable route. See 2 *Thompson supra*, § 534. We hold that the rule as applied to property like this means a practical inability to have access any other way than by a way of necessity. Accord: *Crotty* v. *New River & Pocahontas Consol. Coal Co.*, 72 W. Va. 68, 78 S.E. 233, 46 L.R.A. (N.S.) 156. For this purpose the law assumes that no person intends to render property

conveyed inaccessible for the purpose for which it was granted. And, of course the reverse is also true, i.e., that he does not intend to render lands retained inaccessible. The scope and type of the use, present and future, varies with the necessity. See 2 *Thompson, supra*, 550 (perm. ed. 1939).

Nor does it matter that there is property belonging to a third person, whose rights have not been determined herein, involved in the location of this right-of-way. For the general and modern rule, which we approve, is that a right-of-way may be appurtenant to land even when the servient tenement is not completely adjacent to the dominant. See *Annot.*, 76 A.L.R. 597, and *Jones v. Stevens*, 276 Mass. 318, 177 N.E. 91, 76 A.L.A. 591 (1931).

Defendant also urged that the common law doctrine of implied easements has been superseded by "the Colorado Constitution, and by the Colorado Revised Statutes". In this she is in error. In *Crystal Park Company v. Morton, et al.*, 27 Colo. App. 74, 146 Pac. 566 (1915), it was held that the Colorado Constitution does not preclude such an easement when the court said:

> "At the time of the adoption of our constitution the phrase 'ways of necessity' had a technical and limited meaning at common law, and respondents contend that it is so used in the constitution. * * * If the exception in question has reference to the common law way of necessity, it is not a grant of any right or power, for that right, arising from a private grant, had been recognized for more than two hundred years before the adoption of the constitution; nor would it be a reservation from the general inhibition against taking private property without consent of the owner, because, as has been said, the common law 'way exists only by consent of the owner of the servient estate'."

We turn now to the alleged error urged by defendant based on the trial court's taking judicial notice of the depressed condition of the mining industry during at least part of the period involved.

In this regard it should be pointed out that laches does not apply to a way of necessity for the law is clear that a way of necessity can remain dormant without affecting the right. 2 *Thompson, supra*, 533. Thus, we need not determine whether the judicial notice of mining conditions was error for it was immaterial.

The judgment is affirmed.

Mr. Justice Moore not participating.

NO. 20198

BESSIE WAGNER, Plaintiff in Error,

vs.

CHARLES N. FAIRLAMB, GERTRUDE MAHONEY, SANNA LILJESTROM, VIOLA RASO, JAMES R. FYFE, and MILDRED FENNAS, Defendants in Error.

Error to the District Court of the County of San Miguel, State of Colorado.

Hon. George V. Kemper, *Judge*

PETITION FOR RE HEARING ON DECISION OF COURT en banc

WRITTEN BY MR. JUSTICE SUTTON

Messrs. Lobsch and Kreidler,
Attorneys for Plaintiff in Error.

Messrs. Traylor, Ela, Kladder and Harshman,
Mr. David B. Palo,
Attorneys for Defendants in Error.

In conformity with *Rules of Civil Procedure*, Rule 118 (c), plaintiff in error petitions the Court for a Re-Hearing of the Decision of the Supreme Court en banc written by Mr. Justice Sutton and as grounds therefore would show the Court as follows:

I. The holding of the Court, if left undisturbed, overlooks the element of privity of title.

The stipulated facts as shown in the record, establish without dispute that defendant claims an interest in the Pioneer Mill site through adverse possession against a

stranger to title in a part of the disputed easement. At the time of severance of title to property claimed by the parties hereto, title to the Pioneer Mill site was held by a stranger (f. 649). At page 8, paragraph 2 of the Court's opinion, it is held that the entire area affected by the easement was *once* owned by the parties' common grantor but the Court fails to find, and could not find, that the parties' common grantor owned the Pioneer Mill site at the critical time, i.e., at the time of severance of the unitary title to defendant's property and the property retained by plaintiff's grantor.

As shown by page 10, paragraph 2 of the opinion, the Court misapprehends the argument of defendant, who resists a right-of-way over the Pioneer Mill site in which she claims ownership through possession. The Court disposes of defendant's interest by adopting the diversionary argument that the servient tenement need not be contiguous to the dominant tenement. Defendant has never argued the contrary proposition, but has insisted upon a showing of the required element of unity of title at the time of severance of defendant's and plaintiffs' estates. Such unitary title has never been contended or shown.

II. The Court's opinion misapprehends defendant's argument that the doctrine of easements implied by necessity has no useful purpose to serve in Colorado. The language of the Court's opinion on Page 10, paragraph 2 of said opinion, indicates that the Court believed the conclusion reached to be compelled by *Crystal Park Co.* v. *Martin*, 27 Colo. App. 74, 146 Pac. 566 (1915). The question presented on this appeal was not present in that case. That case held only that the term "Ways of Necessity" had a broader meaning in its context than its narrow, technical, common-law meaning. The case simply held that appellant had the power to bring an action for condemnation of an easement. It is patent that the decision did not bear in any way upon

the compatibility of the Constitution of Colorado or the Colorado Statutes. Defendant's argument appearing at Page 23-31 of her opening Brief, is to the effect that the extremity which gave rise to the doctrine of easements implied by necessity does not exist in Colorado where the owner of isolated property may obtain a right-of-way for a reasonable price through exercise of the power of eminent domain. Defendant believes that the Court overlooked or misapprehended this argument. If the Court chooses to perpetuate the doctrine of implied easements of necessity where its purpose appears to have withered away, it is urged to do so only after meeting and responding to defendant's argument in a meaningful way, giving full consideration to the great interest of the Bar in the answer to this question.

III. The Supreme Court, sitting in review as an appellate body, has cast itself in the role of primary finder of fact.

Responding to defendant's argument that the evidence would not support finding an easement implied by use, plaintiffs' Answer Brief asked the Court to order a new trial in the event the Court should hold the doctrine of easement implied by necessity applicable, tacitly acknowledging that the standard of necessity for an easement implied by necessity is different from the standard applied to an easement implied by pre-existing use (Page 23 of Answer Brief).

The trial court made no finding that the degree of necessity was adequate to support an easement implied by necessity, since it rejected the theory, assuming that it was coextensive with easements implied by pre-existing use. (Tendered Instruction A and f. 1448).

If, in spite of the ancient and respected maxim that an appellate court will not engage in the finding of facts, the Court wishes to make such a finding, the Court overlooks

the fact that the record is utterly devoid of such necessity existing in 1919. On the contrary, undisputed and uncontradicted evidence establishes that there were other ways which were in use to reach the South Half of the Bradley at that time (ff. 842, 1188, 1264, 1089, 1129 and 117). The only necessity that can be established from the record is necessity arising many years subsequent to the conveyance when the primary means of transportation became mechanized.

Defendant, in consequence, respectfully urges the Court to order a new trial for the purpose of trying the question of necessity sufficient to justify an easement implied by necessity, all in accordance with the relief sought by defendant upon this appeal and acceded to by plaintiffs on Page 21 of the Answer Brief.

Respectfully submitted,

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By .....